Case No: 2600695/18

EMPLOYMENT TRIBUNALS

Between:

Miss S Dos Santos Justo	**and**	Worldwide Fruit Ltd
Claimant		**Respondent**

At an Attended Open Preliminary Hearing at the Employment Tribunal

Held at: Boston **On**: Friday 11 January 2019

Before: Employment Judge Hutchinson (sitting alone)

Representation

For the Claimant: In person
For the Respondent: Mr Foster, Solicitor

JUDGMENT

The Employment Judge gave judgment as follows;

The offer of employment made on 12 March 2018 was made on a without prejudice basis and cannot be relied upon by the claimant in these Employment Tribunal proceedings

REASONS

1. The Claimant presented her claim to the tribunal on 22 March 2018. She was employed as Intake Quality Controller from 26 June 2017 until 23 January 2018.

2. Her claims are;
   - unfair dismissal under section 103A of the Employment Rights Act 1996;
   - race discrimination.

3. The case has already been listed for hearing on 3, 5 and 6 June 2019 at the Lincoln Hearing Centre.

4. At a telephone case management preliminary hearing conducted by my colleague, Employment Judge Moore, she identified the claims and issues. She ordered the Claimant to provide further and better particulars of her claim and granted the Respondent permission to file amended grounds of resistance.

5. Employment Judge Moore identified that part of the claim of race discrimination arose out of a discussion that took place during the early conciliation period and in particular out of a meeting between Trisha McCarron (the HR Director for the Respondent) and herself which took place on 12 March 2018.

The hearing today

6. The purpose of the hearing today was to determine whether the discussions that took place on that day and offer made to the Claimant arising out of that meeting, were without prejudice and therefore could not be relied upon by the Claimant.

7. At the hearing today, I had a witness statement from Trisha McCarron and there was an agreed bundle of documents and where I refer to page numbers, it is from that bundle. It was not necessary to hear evidence from the Claimant or indeed Tricia McCarron because the evidence was not in dispute.

The events in question

8. After the Claimant's dismissal on 23 January 2018 and her unsuccessful appeal, she contacted ACAS. The ACAS Early Conciliation certificate (which is at page 61) shows that she notified ACAS on 8 February 2018.

9. Tricia McCarron then arranged to meet with the Claimant on 12 March 2018. ACAS were aware of these discussions.

10. At the meeting, the Claimant was offered the job of Shift Quality Controller.

11. The Claimant initially rejected this offer on 19 March at 08:31 am (pages 59 – 60). This was acknowledged by Tricia McCarron who then received a further email from the Claimant at 10:13 am wishing to accept the offer (pages 58 – 59).

12. Ms McCarron responded to that email at 13:26 to say that after the Claimant had declined the offer, the role was offered to another candidate who had accepted it.

13. The Claimant's allegation was that this action amounted to another act of discrimination and the Respondent's position is that it was simply an attempt by them to resolve the matter, which failed.

The relevant law

14. Section 111 A of the Employment Rights Act 1996 provides;

"(1) Evidence of pre-termination negotiations is inadmissible in any proceedings on a complaint under section 111.

This is subject to subsections (3) to (5).

(2) In subsection (1) "pre-termination negotiations" means any offer made or discussions held, before the termination of the employment in question, with a view to it being terminated on terms agreed between the employer and the employee.

(3) Subsection (1) does not apply where, according to the complainant's case, the circumstances are such that a provision (whenever made) contained in, or made under, this or any other act requires the complainant to be regarded for the purpose of this part is unfairly dismissed.

(4) In relation to anything said or done which in the tribunal's opinion was improper, always connected with improper behaviour, subsection (1) applies only to the extent that the tribunal considers just.

(5) Subsection (1) does not affect the admissibility, on any question as to the cost or expenses, but evidence relating to an offer made on the basis that the right to refer to it on any such question is reserved.

These provisions were considered by the EAT in **Faithorn Farrell Timms LLP v Bailey 2016 IRLR 839.** Section 111A runs in parallel with the without prejudice rule which continues to apply where there is a dispute between the parties and their written or oral communications amount to a genuine effort to resolve the dispute. The section was introduced to allow greater flexibility in the use of confidential discussions as a means of bringing an employment relationship to an end. Unlike the common law principle under section 111A there is no requirement for a pre-existing dispute between the parties and where section

111A applies the evidence of pre-termination discussions is admissible only in ordinary unfair dismissal proceedings.

15. As far as the without prejudice rule is concerned, I considered the case of **Framlington Group Limited and another v Barnetson 2007 EWCA Civ 502.** The Court of Appeal considered the without prejudice rule in the context of a wrongful dismissal claim. Auld LJ dealt with its scope, the policy justifications for the rule and the exceptions to it. The Court of Appeal made clear that the dispute may engage the without prejudice principle even if litigation is not yet begun. The critical consideration is whether in the course of negotiations parties contemplated or might reasonably have contemplated litigation if they could not agree. This is a fact sensitive question.

My conclusions

16. I am satisfied that the negotiations between Ms McCarron and the Claimant were "without prejudice" negotiations. The parties were in dispute with each other as was indicated by the fact that the Claimant had, by the time the meeting with Tricia McCarron, contacted ACAS as a precursor to issuing her Tribunal application. This was also evidenced in the email chain that I have referred to above. It can be seen from that correspondence that discussions were taking place with Liz Corder from ACAS and that is how the meeting was arranged. It is also noted that in the email exchanges, the Claimant herself refers to;
"*Subject: Early conciliation notification; R116195/18 – meeting"*

17. I am satisfied that the offer of employment made on 12 March 2018 was "without prejudice" and therefore cannot be relied upon in the tribunal proceedings.

18. Those discussions and correspondence are therefore priviledged and must not be referred to at the tribunal hearing.

CASE MANAGEMENT SUMMARY

I then went on to consider what case management orders were necessary

Judicial Mediation

1. I discussed with the parties the prospect of Judicial Mediation and both agreed that this would be worthwhile.

2. No additional facilities are required.

3. I emphasised that the Respondent would need to ensure that a decision making authority was present at the Judicial Mediation Hearing with full authority to resolve matters. In that regard, the Respondent confirmed that Ms McCarron would be in attendance and as HR Director, will have full authority to resolve matters. The Claimant will attend herself and I suggested that it might be useful if she had a friend in attendance with her.

4. The issues in the case are those identified previously.

5. Documents for the Judicial Mediation will be limited. The parties will agree the same in advance of the Judicial Mediation Hearing and the Respondent will being one copy of the documents to the tribunal before the hearing.

The Judicial Mediation hearing

6. The Judicial Mediation Hearing will take place by way of a private case management discussion on **Wednesday 20 March 2019** at **09:30**. It will be held at the **Tribunal Hearing Centre, 50 Carrington Street, Nottingham NG1 7FG.**

ORDERS

Made pursuant to the Employment Tribunal Rules 2013

1. The discussions that took place between Tricia McCarron and the Claimant on 12 March 2018 and the subsequent correspondence was undertaken on a without prejudice basis. Those discussions and correspondence are therefore priviledged and must not be referred to at the Tribunal hearing.

2. Paragraphs 3 and 14 – 19 inclusive of the amended pleadings are to be excluded and will be redacted.

3. In respect of the amended response, paragraphs 25, 26 and 27 will be excluded and redacted.

The final hearing

4. The final hearing remains listed at the Lincoln Hearing Centre at the Magistrates Court, 358 High Street, Lincoln LN5 7QA on **Monday 3 June 2019, Wednesday 5 June 2019 and Thursday 6 June 2019 at 10 am** each day or as soon thereafter on each day as the tribunal can hear it. The first morning will be a reading morning and the parties are to attend at 12 noon ready to commence the proceedings.

Case management orders for the final hearing

5. The Claimant shall set out in writing a revised schedule of loss setting out the remedy that the tribunal is being asked to award by **8 February 2019**. The Claimant shall send a copy of the same to the Respondent. She will include any evidence and documentation supporting what is claimed and how it is calculated. It will also include information about what steps she has taken to reduce any loss, including any earnings or benefits received from new employment.

6. The Claimant and the Respondent shall send each other a list of any documents they wish to refer to at the hearing and which are relevant to the case by **15 February 2019.**

7. The Claimant will send copies of any documents that are required by the Respondent for the preparation of the bundle by **22 February 2019**.

8. The Respondent shall then prepare sufficient copies of the documents for the hearing. The documents should be fastened together in a file, which will be indexed and numbered consecutively. The Respondent shall provide to the Claimant a copy of the file by **8 March 2019**.

9. The parties shall prepare full written statements of the evidence they and their witnesses intend to give at the hearing and will exchange their witness statements on or before **5 April 2019**. No additional witness evidence may be allowed at the hearing without permission of the tribunal. The written statements shall have numbered paragraphs.

10. The Respondent will provide and deliver to the Tribunal Hearing Centre by 09:30 on the first morning of the hearing 4 copies of the bundle of documents and four copies of the witness statements of the Claimant and the Respondent.

Employment Judge Hutchinson

Dated 11 February 2019

Notes

(i) The above Order has been fully explained to the parties and all compliance

dates stand even if this written record of the Order is not received until after compliance dates have passed.

(ii) Failure to comply with an order for disclosure may result on summary conviction in a fine of up to £1,000 being imposed upon a person in default under s.7(4) of the Employment Tribunals Act 1996.

(iii) The Tribunal may also make a further order (an "unless order") providing that unless it is complied with the claim or, as the case may be, the response shall be struck out on the date of non-compliance without further consideration of the proceedings or the need to give notice or hold a preliminary hearing or a hearing.

(iv) An order may be varied or revoked upon application by a person affected by the order or by a judge on his/her own initiative. Any further applications should be made on receipt of this Order or as soon as possible. The attention of the parties is drawn to the Presidential Guidance on 'General Case Management': https://www.judiciary.gov.uk/wp-content/uploads/2013/08/presidential-guidance-general-case-management-20170406-3.2.pdf

(v) The parties are reminded of rule 92: "*Where a party sends a communication to the Tribunal (except an application under rule 32) it shall send a copy to all other parties and state that it has done so (by use of "cc" or otherwise). The Tribunal may order a departure from this rule where it considers it in the interests of justice to do so".* If, when writing to the Tribunal, the parties do not comply with this rule, the tribunal may decide not to consider what they have written.

Order sent to Parties on

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